

The Case of the Dutcheſs of Albemarle, and of the Creditors and Executors of the late Duke of Albemarle; with Reasons to ſhew that it is purely Dilatory, and highly Unreaſonable to allow any further Time to Examine Witneſſes.

THE Fact of the Caſe as it appears proved by many Witneſſes of undeniable Credit is, That the late Duke of Albemarle intending to go to Jamaica did moſt ſolemnly and deliberately make his laſt Will bearing date the 4th. of July, 1687. It was drawn by my Lord Chief Juſtice Pollexfen purſuant to the Directions he had received from the Dukes own Mouth in December, 1686. And from that time till July he had often Diſcourſed and Conſulted with my Lord Chief Juſtice Pollexfen, and Sir Thomas Stringer about it. And my Lord Chief Juſtice Pollexfen having read the Draught to him, It was well approved by his Grace, who then deſired him to be one of the Executors, and to get the ſame Inrolled by his Clerk, which was accordingly done. And afterwards at Sir Robert Clayton's the Duke Perſected and Published Three ſeveral Parts of this Will, All of them in the ſame Words, and each of them containing 19 Sheets of Paper, and put his Hand and Seal to every one of the 19 Sheets, And afterwards Sealed each Part in ſeveral Covers, and Endorſed on the Covers with his own Hands theſe Words, *My Will the 4th of July*. He kept them all in his own Cuſtody till his going to Jamaica, And then delivered one of them to the Lady Elizabeth Peirpoint, to be by her given to the Dutcheſs of Newcaſtle; Another of them he left with his Kinſman Colonel Moſk, to whom he had thereby given a great part of his Eſtate; And the Third he carried with him to Jamaica, and all the Three parts are now produced and proved.

The Earl of Bath would avoid all this by a former Will he ſays the Duke made in 1675. And the Queſtion, *Whether a former or a latter Will ſhall take effect* being Plain againſt him, there is a Deed ſet up in 1681. which, as is Expreſſed in the Deed, was to Corroborate and Confirm the Will of 1675. but by ſettling the Eſtate to other Uſes than that Will did does in truth revoke it.

It were too tedious here to tell the Badges of that Deed (if any ſuch Deed there be) further then that it is allowed there is in it a Power very Extraordinary, that the Duke might revoke it in preſence of Six Witneſſes, whereof Three to be Peers; And a Covenant that he would not revoke his former Will, unleſs in preſence of Six ſuch Witneſſes. And by this the Earl would have the laſt Will void, and would have it believed that the Duke knew and deſigned that it ſhould ſignifie nothing, which is highly diſhonourable to the Memory of my Lord Duke, and fully refuted by the Proofs in the Caſe; The late Printed Caſe of the other Side would prove this by a moſt falſe Aſſertion, That the uſual Words of revoking former Wills was induſtriouſly omitted, but the true Reaſon for not inſerting thereof was that my Lord Chief Juſtice Pollexfen well knew that in Law it was wholly ſuperfluous and unneceſſary to be added.

In Eaſter Term 1689. the Earl brought his Firſt Allegation, and Exhibited his Will and Deed, and Examined all his Witneſſes to prove them. In the 21th. of June, 1689. it was moved for the Executors of the laſt Will to have the Caſe aſſigned for Sentence, but prevented by the Earl.

On the 11th. of July, 1689. the Earl brought his Second Allegation, and his Witneſſes to that have alſo been Examined; And this gave Dr. Barwick occaſion to bring another Allegation which was the 12th. of September, 1689. And part of it was to give an Account how the ſaid Third part of the Will had been carried to Jamaica, and kept and owned by my Lord Duke there; a Matter of very little moment in the Caſe, conſidering that it had been originally made and published in England. And it has never been ſo much as pretended by the Earl that he did any Act whatſoever in Jamaica, or elſewhere, to revoke it.

On the ſaid 12th. of September the Judge, according to the Courſe of that Court, Aſſigned a competent Time to plead all in Fact, and gave the Earl to the 3d. of October, and Dr. Barwick to the 17th. of October. And it is here to be obſerved, That the Earl before that time having ſeen the Allegation which mentioned Jamaica did on the 3d. of October declare he would plead no more.

On the 17th. of October, purſuant to the ſaid Order, Dr. Barwick gave in an Allegation, which related to nothing but what my Lord Chief Juſtice Pollexfen knew of the ſaid Matters, and in Michaelmas Term, 1689. all the Witneſſes for the laſt Will were examined, and Publication paſſed, and the Caſe aſſigned to Sentence.

And then, when it appeared by the Depoſitions of my Lord Chief Juſtice Pollexfen, and the reſt of the Witneſſes, that there was no life in the Caſe, on the 3d. of December, 1689. The Earl then brought a Third Allegation, and this is that on which he deſired a Commiſſion to Jamaica; The Judge 'tis true might have denied to receive it, either as not relevant or to the purpoſe, or for that the Earl had declared on the 3d. of October he would plead no more as aforeſaid; but in great favour to the Earl, and beyond the ordinary Courſe, it was received, not foreſeeing the delay and uſe was to be made of it. And the Judge gave him to the 9th. of January to prove it, and no mention of a Commiſſion to Jamaica till the 13th. of December, and then the Earl published all his former Depoſitions, and prayed a Commiſſion to Jamaica, which the Judge denied to give him, looking on the ſame as purely dilatory, And that if what he ſaid he could prove in Jamaica were true, it was not to the purpoſe.

The Earl for this brought an Appeal before Commiſſioners Delegates, and the Lords Commiſſioners of the Great Seal had ſuch a Senſe of the Matter, That it was with great Difficulty they were perſwaded to ſeal the Commiſſion. And the Earl cannot forget that the Lord Commiſſioner Maynard asked him, *Whether he had any Witneſs in Jamaica to prove that the Duke did any thing to revoke this Will*; taking that to be the only material thing he could aim at, and his Lordſhip confeſſed he had none.

The Caſe of Appeal was brought to Sentence, and heard on the 28th. of Feb. And on a long Hearing the Judges Delegates, viz. The Lord Preſident, Earl of Shrewsbury, Earl of Pembroke, Earl of Nottingham, Lord Chief Juſtice Holt, Mr. Juſtice Dolben, and others, affirmed the Sentence of the Judge in the Prerogative, and as to the principal Caſe aſſigned the ſaid Earl, then preſent, a time for proving of his Allegations, to the firſt Court Day of Eaſter Term, which was about Three Months, and this was a peremitory time, *Ad probandum & probatam habendam Allegationem*.

On the 24th. of May, 1690. the Caſe was aſſigned by the Delegates to be heard on the 2d. Day of June, 1690. and then when the Caſe was juſt ready to be aſſigned to a final Sentence, the Earl claimed his Privilege.

Note, That from the 20th. of Feb. to the 2d. of June, the Earl did not Examine any Witneſs, though it is entered in the Books at Doctors Commons that his Lordſhip declared he had one Witneſs in England.

This Matter has been already twice ſolemnly Adjudged in its proper Jurisdiction; and having already proved, That the Earl by Acting, Speaking and Writing, hath waved his Privilege, the Merits of this Caſe, as is conceived, is not properly before the Lords: However there is no way better to ſatiate their Lordſhips that there was no Hardſhip done the Earl, than to look into the Contents of the Third Allegation, And the Articles of it, which at firſt he ſaid his Witneſſes in Jamaica could prove, are ſo little to the purpoſe, that were it not that they do ſo reflect on the Duke and Dutcheſs, we would allow them to be true, though we are ſure no Witneſs can truly prove them. They are to this purpoſe, That the Dutcheſs having no kindneſs for the Earl, did importune my Lord Duke to alter his Will of 1675. and that the Duke reſuſed to do it, and was by her afterwards perſwaded to diſcourſe with Mr. Pollexfen about a Will; and that before he went to Jamaica ſome Council of the Dutcheſſes preſſed the Duke to ſettle his Eſtate by Deed, or to confirm the Will of 1687. and that he abſolutely reſuſed it: Yet that the Dutcheſs cauſed a Deed to be drawn to confirm the Will, and carried it to Jamaica where ſhe preſſed him to execute it, but that he denied to do the ſame, and that ſhe did ſo violently preſs him ſometimes to alter his Will, and ſometimes to make a Deed even to the time of his Death, and to give her his Eſtate, that he was thereby diſcompoſed to a degree of Diſtraction. What does all that (if it were true, as it is not) ſignifie to the Will, which (as is fully proved) was ſo ſolemnly made in England. And if the Importunities of the Dutcheſs were of any force in the Caſe, then the Earl by his Allegation has given it againſt himſelf, for of his own ſhewing the Duke did not comply with her Importunities, but denied to perfect what ſhe would have him.

Yet from the Importunities of the Dutcheſs it is that they would have the laſt Will void by the Deed, and for that there is not Six Witneſſes, and Three of them Peers: Whereas every body knows that a Will is, *Ambulatoria uſque ad mortem*, and a Man cannot tie himſelf from making a Will; and if there be any ſuch Deed the moſt can be made of that Caſe is, That the Duke made a Will contrary to his Covenant, but the Will muſt ſtand; for this being in a Deed cannot amount to a Caſe Derogatory, which is never but in a Will; and if it were a Claſe Derogatory in a Will, yet it would be of no effect here where the laſt Will is ſo ſolemnly proved. And though 'tis true there are but Three ſubſcribing Witneſſes to the Will, yet we have proved it by above Six credible Witneſſes; ſo then there wants neither Credibility nor Number, but only Quality, for Three of them to be Peers, And that would bring it to be even within the very Letter of the Deed. And if the Duke had known, or remembered any thing of the Deed, yet where he died in Jamaica he was abſolutely incapacitated literally to purſue it, there being no Peers there.

For thoſe Articles of the Allegation, which relate to the Dukes deſigning that this laſt Will ſhould ſignifie nothing, and that Dr. Barwick uſed it as an Argument to preſs the Duke to comply, elſe the Dutcheſs would relapſe into her former Diſtemper. It is entered in the Book, that the Earl declared he had no Witneſſes in Jamaica to prove them, and Dr. Barwick offered by his Answer to ſwear that which concerns him to be utterly falſe, but the Earl would not have his Answer in the Prerogative; but the Doctor by his Answer in Chancery has ſworn it falſe. And here it is to be noted, though the ſame Matters are at Iſſue, and ſoon to be heard in Chancery, yet the Earl has never there deſired any Commiſſion to Jamaica.

It is not here to be forgot that the Earl ſhewed a Letter from ſome, or one of the Witneſſes in Jamaica to Mr. Barry, the Duke's Chaplain, whereby they refer to Mr. Barry as the Perſon to prove the Importunities and Practices the printed Paper pretends; wherupon being examin'd by the Earl, in preſence of one of the Earls Council, the Earl declared what he ſaid was nothing to the purpoſe; for Mr. Barry told him the Letter was not true, and neither he nor any of the many Servants come from Jamaica have been examined to it; and on the 2d. of June it is entered in the Book that the Earl expected the Witneſſes by the firſt Ship, but though many Ships are ſince come, yet they have brought no Witneſſes.

But that which is worſt of all for the Earl in this Caſe is, That though the Witneſſes were come, yet Publication being paſſed, and the Caſe cloſed, as aforeſaid, they can never be Examined; nor was it ever known that Witneſſes in the Chancery, or Prerogative, were examined *Viva Voce*, to any thing unleſs to explain their former Depoſitions, or to prove the ſigning or ſealing of Deeds, or Writings; and the Earls Council cannot themſelves pretend that they can examine to any thing not contained in the Allegation: Such things were never yet done. And then my Lord Cooke's Argument is, That they cannot, nor ought to be done. And if by this, or any thing elſe, the Earl thought himſelf agrieved, his regular way had been by a Commiſſion of Review, which he has never asked. And if he were permitted to take up his Privilege again, and ſtand upon it never ſo long, that would in no ſort relieve him.

The Creditors and Eſtate by this delay are at great Loſs, a great part of the Perſonal Eſtate which ſhould pay the Creditors conſiſting of Debts due to the Duke on dangerous Securities and Arrears of Rents. And for the Earls offer of an Administration *pendente lite*, it does in no ſort Answer this Miſchief; for that an Administration *pendente lite* amounts to no more than Letters *ad Colligendum*, and where there is a Will (as it is allowed by both Sides here there is) it is void in Law, and no body can be ſued upon it, and till probate of the Will no Decree can be had in Chancery for the Perſonal Eſtate for which Reaſon the Earl put in a Demurrer to the Bill in Chancery, and has the Benefit thereof ſaved to the hearing, and it is part of the Earls Bill in Chancery that he complains, That having proved his Will in the Prerogative he is obſtructed by the Dutcheſs in getting the Probate under Seal, when in truth the Obſtruction is his Lordſhips taking up again his Privilege.

For the Foundation of a Title which the Printed Paper of the other Side lays for the Earl, his Service to both the Two Dukes, 'Tis believed they are more than fully requited; Beſides that, by the laſt Will there is given to his Son an Eſtate which had been of great Value to him if he had lived: Nor can we ſee the force of another Argument of that Paper. If the old Duke procured him a Promiſe under the Sign Manual of King Charles the Second, which in truth was to be Duke of Albemarle, and to have the Reverſion of Theobalds in caſe of his Death without Iſſue Male. Ergo he intended him his Eſtate is a Non ſequitur; for the old Duke made both a Will and Deed, and gave him nothing by either. The other was only the Kings, and if his Lordſhip pleaſes to apply himſelf to the King for the Honour, or to the Earl of Portland for the Eſtate, the Dutcheſs intends neither to hinder nor forward him therein.

